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No. 80-1765

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC., Petitioner,
v.
HYDROLEVEL CORPORATION, Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF AMERICAN CONCRETE INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMERICAN CONCRETE INSTITUTE AS AMICUS CURIAE

The American Concrete Institute ("ACI"), like the petitioner American Society of Mechanical Engineers ("ASME"), is a nonprofit scientific and educational society engaged, among other things, in promulgating standards. ACI's interest in the present matter is based on its concern that, unless reversed, the implied agency standard for antitrust liability adopted by the panel of the Second Circuit will seriously jeopardize the activities

of ACI and similar institutions, and will unduly constrain their ability to provide service to the public. ACI believes that the reasoning of the panel is unsound as a matter of law and unwise as a matter of public policy. This brief is filed by consent of the parties in accord with Supreme Court Rule 36.1, and signed consents are filed herewith.

The American Concrete Institute is a nonprofit scientific and educational society, organized in 1905, with the declared purpose of representing the interests of users of concrete. While some materials producers are members of ACI, their support is minimal and the bulk of its over 15,000 members come from user groups: public agencies, engineers, architects, owners, contractors, educators, and other specialists interested in the design, construction, and maintenance of concrete structures.

ACI publishes three periodicals and numerous special publications devoted to the dissemination of information related to these purposes. ACI also conducts two annual conventions and various meetings and carries on its activities through local chapters located throughout the United States and elsewhere in the world.

Like ASME, one of ACI's most important activities is the development of standards for safe design, construction and maintenance. There are currently over thirty ACI standards in effect concerning virtually every area of concrete practice. ACI standards sometimes take the form of requirements for concrete design or construction intended for incorporation verbatim or by reference into building codes, specifications, or contracts. They may also be in the form of recommended practices which present the best practice in a given field from which a user may prepare specifications. Most ACI standards have been adopted or incorporated by

reference by state and local government and contracting parties. Both ACI and ASME are accredited by the American National Standards Institute ("ANSI"), and their standards are developed through consensus procedures approved by ANSI.

Like ASME, ACI depends heavily upon member volunteers to staff committees to carry out its activities. Under its eighteen-member board of direction are eighteen standing committees, including the technical activities committee, standards board, and educational activities committee. Each standing committee is appointed by the board of direction, acts as the agent of the board and is responsible to the board for performance of functions assigned to it.

In addition to the board and standing committees, the activities of ACI are accomplished through over 100 educational and technical committees made up of over 2000 volunteers drawn from the membership of ACI. These committees are authorized by the board but report to the educational activities and technical activities committees. The actions of all committees are subject to the review and approval of the board of direction.

The educational committees are responsible for the dissemination of information for educational programs, seminars, and workshops. The technical committees are assigned specific tasks relating to dissemination of information on improvement of the design, construction, manufacture, use and maintenance of concrete structures and products. Proposals for the adoption, amendment or repeal of ACI standards originate in the appropriate technical committee.

The specifications review committee, a committee reporting to the technical activities committee, is responsible for the specifications programs. This committee plans the programs and reviews the finished work of the technical committees for both proper

specifications form and technical content. The specifications review committee is responsible for coordinating all specifications, ensuring that they are kept current, and encouraging the use of ACI specifications.

All proposed new standards or revisions to existing standards, including minority reports from sponsoring technical committees, are forwarded from the technical activities committee to the standards board. The standards board is responsible for matters of policy, procedure, and appeal pertaining to ACI standards. Its primary function is to verify that proper standardization procedures have been followed and to rule on matters of policy as related to standards. The standards board may by majority vote approve a proposed standard for publication and presentation to a convention for discussion or may return it with comments to the technical acitivities committee for reconsideration.

When formally adopted by a majority of the members voting by letter ballot, the codes, specifications, or recommended practices developed by the technical committees become ACI standards. The consensus-developed standards then become officially endorsed publications of ACI covering the many aspects of concrete practice.

ACI at present issues no formal interpretations of its standards. However, informal opinions regarding ACI standards have been rendered from time to time by ACI staff or members of the originating committee.

ARGUMENT

ACI submits that the decision of the Second Circuit panel was erroneous both as a matter of law and as a matter of public policy, and respectfully urges that this Court grant the present petition for a write of certiorari.

I.

THE CIRCUIT COURT ERRED AS A MATTER OF LAW.

ACI concurs with the petitioner's argument that the panel misconstrued the applicable law, and that the decision is inconsistent with previous decisions of this Court, previous decisions of other federal courts, and the Restatement (Second) of Agency. ACI will not burden the record with a lengthy recapitulation of arguments ably presented by petitioner. ACI would emphasize, however, that in *United Mine Workers of America* v *Coronado Coal Co.*, 259 U.S. 344, 393 (1922) and in *Coronado Coal Co.* v. *United Mine Workers of America*, 268 U.S. 295, 304 (1925), this Court squarely held that liability under the Sherman Act for acts of a third party are limited to cases of actual agency or ratification of the acts constituting the alleged violation. This standard is consistent with and indeed mandated by the well-settled rule that a conspiracy exists under Section 1 or Section 2 of the Sherman Act only where there are two or more conspirators who had a "unity of purpose or a common design or understanding" to cooperate to achieve a proscribed result. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213-14 (1951). Compare *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 443-46 &

nn. 19, 20 (1978); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 810 (1946). In adopting an apparent agency theory, the Court of Appeals erroneously analogized Sherman Act conspiracy claims to the torts of defamation, interference with business relations, misrepresentation and fraud. This characterization ignores the fact that the question of agency is relevant only to determine whether the crucial element of conspiracy underlying the Section 1 and Section 2 violations exists. Apparent agency or negligent supervision cannot, as a matter of law, create an antitrust conspiracy between the purported principal and a third party whose actions it has not authorized, ratified, or benefited from.

The panel moreover erred in concluding that treble damages under the antitrust laws should be available on the basis of apparent agency. Broad theories of agency liability are inappropriate where punitive damages are automatically imposed by statute. *Asphalt Industries, Inc.* v. *Commissioner*, 384 F.2d 229 (3d Cir. 1967); *United States* v. *Ridglea State Bank*, 357 F.2d 495 (5th Cir. 1966).

Nor can the "victim" of the alleged conspiracy in the instant case, unlike plaintiffs in fraud or business tort cases, claim to have relied on any apparent agency of the ASME members involved. Indeed, the record shows that Hydrolevel did not even become aware of the letter in question until over eight months after that letter had been issued.

This case should be governed by the controlling authority of *Coronado Coal*. A writ of certiorari should be granted, and the order of the Circuit Court panel should be reversed on the issue of liability.

II.

THE COURT OF APPEALS PANEL ERRED AS A MATTER OF PUBLIC POLICY.

Like ASME, ACI is acutely aware of the disservice which the Court of Appeals opinion will do to the public interest. ACI and ASME are but two of many organizations which publish standards based on the expertise their members have gained as practitioners in the technical fields affected. Because of their members' expertise, these organizations are uniquely capable and qualified to develop and promulgate such standards. Indeed, there are virtually no other private groups or entities which would be capable of publishing standards in many of the areas concerned. In view of the large number of technical fields and the many types of specialized expertise involved, it would be impractical and uneconomic to expect federal, state and local governmental units to step into the breach which would be left if these organizations were forced to curtail their activities. Indeed, in the view of some, a further expansion of government in these areas would be inappropriate in its own right.

The importance to the public of the standards and related educational activities of organizations such as ACI and ASME cannot be overstated. ACI standards protect the health and safety of the public by providing structural safety and performance guidance for designers, educators, government and business for a broad range of concrete structures including buildings of all types, bridges, nuclear structures, sanitary engineering structures, and offshore concrete structures. They cover such topics as draft building codes; mixing, placing and handling of concrete; durability of concrete; and fatigue, corrosion and cracking of concrete, to mention but a few.

The impact of the Circuit Court decision on the activities of bodies such as ACI is potentially far-reaching and destructive. ACI must and does rely upon its members to staff its many committees to draft, modify and interpret its standards. ACI believes that it has a more than adequate set of review procedures, and that these procedures are consistently and carefully applied. However, any system can be abused by a willful and faithless person.* The possibility that the activities and review procedures of ACI and similar organizations could be second-guessed by litigants and courts and could form the basis for large monetary judgments and injunctive relief would have a profound chilling effect on ACI and on other similar groups and their activities.

Indeed, under the panel's ruling, technical and scientific societies such as ACI could be subjected to (or threatened with) antitrust liability for many activities other than publishing standards or interpretations. Liability could be premised on many other educational and informational activities which may cause competitive disadvantage to some party. For example, a speaker at a meeting or seminar sponsored by ACI or an author of an article published by ACI might make a comment unfavorable to a product or process which could be alleged to be part of a conspiracy to restrain trade. The Circuit Court ruling could threaten ACI with massive liability for such comments, even though they were not authorized or ratified by ACI, and even though any underlying conspiracy was unknown to ACI and acted to its detriment. As this Court well knows, the cost of defending against an antitrust claim is substantial, whatever their merits of the claim. The broad standard of agency adopted by the panel would increase the number of

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* If ACI activities are abused, the proper recourse for any injured party would be against the offending individuals and actual beneficiary.

such suits and would have a severe and unwarranted chilling effect on the many valuable activities of organizations such as ACI.

ACI submits that the proper standard for liability under Section 1 and Section 2 of the Sherman Act where a conspiracy involving an agent is alleged is the standard of actual agency or ratification recognized in the *Coronado Coal* decisions of this Court and the similar decisions of other courts that have considered the issue. Adoption of an implied agency theory would do a severe disservice to virtually every member of the public, all of whom benefit from the services of ACI and other voluntary scientific and educational organizations, while providing virtually no increased protection from anticompetitive injury.

CONCLUSION

For the reasons set forth herein and by the petitioner, the American Concrete Institute respectfully prays that the petition of the American Society of Mechanical Engineers for a writ of certiorari be granted, and that the decision of the Court of Appeals be reversed on the issue of liability.

Respectfully submitted,

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